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STATE FOR EB/TPP/IPC AND EAP/K
STATE PASS USTR FOR CHOE-GROVES, CUTLER AND KI
COMMERCE PASS USPTO FOR URBAN
STATE PASS LIBRARY OF CONGRESS FOR TEPP AND POOR
TREASURY FOR IS/ISA/BUCKLEY AND ITT/CHANG
COMMERCE FOR 4431/IEP/OPB/EAP/MBMORGAN AND JBOGER
GENEVA FOR USTR

TAGS: [ETRD](#) [KIPR](#) [ECON](#) [PREL](#) [KS](#)

E.O. 12958: N/A

SUBJECT: KOREA SPECIAL 301 IPR REVIEW: EMBASSY RECOMMENDS
RETAINING "WATCH LIST" STATUS FOR KOREA

REF: A) SEOUL 212

- B) 05 SEOUL 5122
- C) 05 SEOUL 4551
- D) 05 SEOUL 3942
- E) 05 SEOUL 3903
- F) 05 SEOUL 3277
- G) 05 SEOUL 2936
- H) 05 SEOUL 2435
- I) 05 SEOUL 1256
- J) 05 SEOUL 932
- K) 05 SEOUL 872

OVERVIEW

11. (SBU) Following Korea's removal from the Special 301 "Priority Watch List" in April 2005, the Korean government continued to move forward in a number of areas to improve the level of intellectual property rights (IPR) protection in Korea. These measures included: introducing legislation that will significantly enhance protection for sound recordings transmitted over the Internet (both peer-to-peer and web-casting); implementing regulations that restore the ability of the Korea Media Rating Board to take necessary steps to stop film piracy; increasing enforcement activities by the Standing Inspection Team against institutions using illegal software; establishment of the Copyright Protection Center to better safeguard IPR both online and offline; and a commitment to the continue the implementation of the "IPR Master Plan" under the leadership of the Prime Minister's Office, with the aim of providing overall policy guidance to the government as it works to further improve IPR protection in Korea.

12. (SBU) Korean recognition of the importance of IPR protection has increased in recent years, and will likely improve further as the amount and value of domestic Korean IPR grows. Recent judicial decisions concerning piracy of copyrighted materials, and the scope of liability in cases involving illegal file-sharing and other IPR cases, are providing useful precedents and helping to bring Korea's legal system in line with international norms. While some civil society groups continue to call for "fair use" and demand "netizen" rights, general public sentiment towards

IPR violations is progressing toward acknowledgement of the criminality of using IPR content without paying for it.

¶3. (SBU) Public and private interest in effective IPR enforcement has been manifested through a series of seminars, conferences and resolutions considering how to actively enforce rightholders' claims. As Korea moves to establish itself as a world leader in information technology (IT) through innovations in both hardware and software, more attention is being paid to the benefits that will accrue to Korean rightholders through a comprehensive and vigorous approach to IPR enforcement. Additionally, the Korean government's pursuit of a U.S.-Korea Free Trade Agreement should provide additional impetus this year toward further enhancement of Korea's IPR regime.

¶4. (SBU) Despite this progress, the Embassy's view is that Korea should be retained on the Special 301 "Watch List." Korea's IPR protection regime continues to have important gaps, and changes need to be made to Korean law to strengthen protection of temporary copies, and allow for technological protection measures, Internet Service Provider (ISP) liability, ex parte relief, and coordination between Korean health and IPR authorities to prevent marketing approvals for patent-infringing products. In addition, Korea still lacks full retroactive protection for pre-existing copyrighted works, and its copyright terms need to be extended. Finally, we remain concerned about insufficient progress in fighting book piracy in universities and street vendor sales of illegally copied DVDs, and continue to cast a watchful eye to ensure no erosion of protection for confidential pharmaceutical test data. End Overview.

KOREAN IPR PROTECTION IN 2005

¶5. (U) In support of the above recommendation, this message focuses primarily on new developments in Korean intellectual property rights protection in 2005, while also outlining the general state of affairs on IPR protection, including the enforcement situation, and the identification of continuing gaps in Korea's IPR protection regime. While not an exhaustive review, we have addressed most salient issues. The issues covered below are:

- Copyright Law
- Computer Program Protection Act
- Copyright Treaties
- Copyright-related Judicial Cases
- Data Protection
- Patent Protection
- Enforcement Trends
- Software Piracy
- Optical Media Piracy
- Counterfeit Goods
- International Cooperation and Training
- Korea's "IPR Master Plan"
- Conclusion and Comment

COPYRIGHT LAW

¶6. (U) Because Korea has one of the highest levels of broadband Internet penetration in the world, the United States has urged the Korean government to develop an effective response to the unique challenges posed by the changing nature of digital copyright piracy. In particular, we have sought improvements to Korean copyright law to stem Internet-based copyright violations.

¶7. (U) In 2005, the Korean government prepared and submitted several very important amendments to the Copyright Act. The proposed amendments would significantly enhance protection for sound recordings transmitted over the Internet, either through peer-to-peer transmission or via web-casting, by giving rightholders, performers, and phonogram producers significantly enhanced rights to control the transmission or

broadcast of their phonograms. The amendments would also limit public performances of copyrighted works and eliminate the complaint requirement in certain cases.

¶18. (U) Unfortunately, while the necessary legislation for these amendments was introduced and underwent preliminary deliberation at the Committee level in Korea's National Assembly in late 2005, as of this report, the legislation has not yet been enacted into law. Korean and foreign copyright protection groups have testified at informal and formal hearings in support of the legislation, and the USG has also submitted formal comments in support of the legislation. On the other side, "user rights" groups have sought to water down or stall the legislation. We will continue to monitor progress and encourage the Korean National Assembly to take action on these important amendments.

¶19. (U) Beyond the pending improved legislation, the United States continues to discuss further improvements to the Copyright Act with the Korean government. Currently, Korean law does not extend the reproduction right to cover copies made in the temporary memory of a computer, a significant and still growing manner for use of copyrighted works. The United States continues to urge Korea that to strengthen both the Copyright Act and Computer Program Protection Act by revising the laws to clarify that the copyright owner has the exclusive right to make copies, temporary or permanent, of a work or phonogram. We are also still concerned about limitations on the use of technological protection measures (TPM's) that manage access to a work, and we seek further clarification on Internet Service Provider liability. The current Copyright Act amendments still leave unclear the scope of the underlying liability of service providers and the limitations on and exceptions from that liability.

¶110. (U) The U.S. Government has also told the Korean government that the private copy exceptions of the Copyright Act generally should not be applicable to the Internet environment, which by its very nature extends far beyond

private home use. Concerning library exceptions under Korea's Copyright Act, the U.S. Government believes that a notice period of at least 30 days should be given to rightholders prior to the unauthorized digitization of their works, to minimize any negative effects. Under the current law, library exceptions still apply only to literary works and not to broadcasts, performances and sound recordings. The U.S. Government has also urged Korea to delete the reciprocity limitations relating to database protection in the Copyright Act, as it discourages the introduction of databases from countries without such legislation, including the United States.

¶111. (U) Korea currently provides copyright protection for the life of the author plus 50 years. In line with international trends, the United States is urging Korea to extend the term of copyright protection for works and sound recordings to the life of the author plus 70 years or 95 years from date of first publication where the author is a legal entity.

COMPUTER PROGRAM PROTECTION ACT -----

¶112. (U) Improvement of Korea's Computer Program Protection Act (CPPA) to meet current challenges, as well as to comply with new global norms, continues incrementally. Proposed amendments to the CPPA would increase the power of the Program Mediation and Deliberation Council (PDMC) and increase penalties for asserted violations of Korean IPR-related laws. Those amendments were introduced and underwent preliminary deliberation in Korea's National Assembly in late 2005. However, as of this report, the legislation has not yet been enacted into law. While supporting the amendments, the USG has suggested additional improvements to the CPPA.

¶13. (U) Concerning software streaming programs -- computer programs permitting the "streaming" of software from a single server to multiple work stations -- no progress was made in 2005 in clarifying the PDMC's mistaken interpretation of the CPPA which included the inappropriate normative statement that software developers "should" offers users a license permitting streaming of their programs (Ref F).

COPYRIGHT TREATIES

¶14. (U) Korea has ratified the WIPO Copyright Treaty (WCT), and has committed to ratifying the WIPO Performances and Phonograms Treaty (WPPT) after the prerequisite legislation has been submitted and approved.

COPYRIGHT-RELATED JUDICIAL CASES

¶15. (U) Complaints were filed throughout 2005 by a variety of groups concerned with illegal sharing of files, principally music. We are encouraged by a number of cases concluded in 2005 that seem to provide the precedent for increased legal protection for rightholders.

¶16. (U) Following a long series of appeals, in 2005 Soribada III, which was Korea's most infamous peer-to-peer (P2P) service provider, was ordered to shut down by Korea's highest court, effectively ending the appeals process. A final decision on Soribada's proposal to modify its service to comply with the court's order and Korean laws is expected soon. Prosecutors also ordered Daum and Naver, two of Korea's largest Internet portals, to cooperate in efforts to shut down blogs and other sites that share copyrighted files.

¶17. (U) Bugs Music, a major P2P provider, also agreed to stop providing files for free following a lengthy court battle. Local rightholders sued to prevent Bugs Music from continuing its service, and the settlement included Bugs Music switching to a fee-based service and the transfer of 60 percent of the shares, as well as management rights, to a domestic music industry group.

DATA PROTECTION

¶18. (U) At USG prompting, the Korea Food and Drug Administration (KFDA) officially reconfirmed on March 31, 2005 that different versions of original drugs undergoing post-marketing surveillance (PMS) in Korea are subject to Korea's data protection regulations. This means that manufacturers have to supply a full portfolio of clinical data in order to obtain market approval if they intend to market their drug while the original drug is still under PMS, thus ensuring the continued honoring of commitments related to data protection required by Article 39.3 of the WTO TRIPS Agreement.

PATENT PROTECTION

¶19. (U) Patent protection in Korea is generally solid, as long as patent rights are clearly established. The Korean Intellectual Property Office (KIPO) has amended relevant rules to address U.S. concerns regarding restrictions on patent term extension for certain pharmaceutical, agrochemical and animal health products.

¶20. (U) However, an issue of continuing concern has been the lack of coordination between the Korea Intellectual Property Organization (KIPO) and the Korea Food and Drug Administration (KFDA), which can result in the granting of marketing approval for products that may infringe on existing patents.

¶21. (U) Also on the patent front, U.S. firms have pointed to Korean courts' apparent unwillingness to provide injunctive relief in cases where KIPO or a lower court has established that a rightholder's patent has been infringed upon, if the case remains under appeal at the Patent Court or a higher court. This allows the infringing products to remain on the market until a final determination has been made. Korea's Patent Court apparently lacks the legal authority to grant injunctive relief. Although the Korean civil courts have the authority to issue injunctive relief in patent cases, in practice such relief remains rare, since the civil courts tend to defer to the Patent Court.

ENFORCEMENT TRENDS

¶22. (U) The establishment of Korea's Copyright Protection Center (CPC) in 2005, to conduct both online and off-line copyright investigations, was a welcome move and we have urged the Korean government to make effective use of the CPC's investigative capabilities and to make its services available to all rightholders, Korean and international. The CPC has been receptive and generally internationalist in approach. From its inception in April 2005 until year's end, CPC investigated nearly 37,000 online users, and brought criminal complaints against 802. These investigations resulted in the deletion of almost 13 million illegal files, the vast majority being music.

¶23. (U) Among its most prominent cases, the CPC abetted the useful judicial precedents noted above by filing a criminal complaint against Soribada III, a renowned peer-to-peer service provider, and against five individuals for maintaining illegal files on one of Soribada's chat sites. CPC also filed criminal complaints against individuals for illegally uploading music to be shared on Internet "cafes" and "blogs." Additionally, CPC filed charges against the operator of one such "cafe" for facilitating the illegal sharing of files through his Internet site.

¶24. (U) During the same period, the CPC also looked into 3,452 cases of possible offline copyright violations -- covering music, video, publications, and games. Of those investigations, approximately 2,900 resulted in seizure or administrative action, and 546 were referred for criminal complaints. In the offline arena, music-related cases made up the largest group -- both in terms of number of cases, and in seizures.

¶25. (U) According to ROKG data on the level of fines and jail sentences imposed on infringers, there is an accelerating rate of investigations, trials and convictions in many areas. For instance, during the first three quarters of 2005 (latest data available), fines were issued in 17,015 cases of IPR violations. Jail sentences were issued in 780 cases, with 103 cases resulting in imprisonment. The United States continues to urge Korea to further strengthen penalties for IPR violations in order to increase their deterrent effect against piracy.

¶26. (U) Korean authorities from a variety of agencies and authorities worked together to increase the level of IPR awareness on university campuses before conducting intensive enforcement campaigns coinciding with the opening of the school year in September 2005. During this enforcement campaign, more than 110 copy-shops were investigated, with more than 5,500 seizures of illegally copied publications. While the number of facilities investigated and the number of publications seized was more than double that of the previous year, the overwhelming majority of the seizures were copies of Korean publications.

¶27. (U) In January 2006, the Seoul Central District Prosecutor's office declined to prosecute more than 13,000 individuals accused of illegal file sharing by a copyright enforcement NGO (Ref A), even as it clarified that it would pursue charges against individuals involved in online

copyright infringement for commercial gain. While the Prosecutor's explanation for its decision did not specifically establish thresholds for prosecution, the Embassy is concerned that the prosecutors unintentionally sent a mixed message to the public, especially young users of popular Internet file-sharing services.

SOFTWARE PIRACY

¶28. (U) Korea has made significant progress towards decreasing the rate of software piracy in recent years. The Standing Inspection Team (SIT) of the Ministry of Information and Communication continues to conduct raids on commercial firms and other institutions suspected of using illegal software. The total number of raids conducted by the SIT in 2005 was 2,537, according to Korean authorities. Of those inspected, some 1,556 were found to be using pirated software.

¶29. (U) Despite these efforts, Korea's software piracy rate in 2005 was estimated to be 46 percent by the Business Software Alliance (Ref B) -- the same piracy rate as in 2004, but reflecting a slight decline in estimated losses from USD 276 million in 2004 to USD 258 million in 2005. The Seoul office of the Alliance reports that it has enjoyed good cooperation in enforcement actions with Korean authorities, including the Standing Inspection Team.

OPTICAL MEDIA PIRACY

¶30. (U) While pirated audio-visual DVD's, sold on the street by informal vendors, may not be as significant a problem as in other countries, concerns remain about ineffective enforcement efforts. The Korean government has not routinely conducted enforcement actions against retail-level operations, in order to focus their efforts on locating large caches of pirated material, or large-scale copying facilities. In 2005, the Korean police did conduct a targeted campaign for a certain time against pirated goods sold at the Yongsan Electronics Market, the most notorious outlet, and this raid appeared to have some limited impact on the trade. We will continue to urge the Korean government to be more proactive at all levels of enforcement, large and small, in order to reinforce public perceptions of the criminality of copyright violations.

COUNTERFEIT GOODS

¶31. (U) The Korea Customs Service kicked off a special border enforcement initiative in February 2006 to focus on intercepting counterfeit items -- especially garments and high-end consumer goods, as well as pharmaceuticals and automotive parts. This three month program consists of nearly 100 inspection teams working with rightholders and counterparts in KIPO and a number of international chambers of commerce. This effort follows two similar initiatives in 2005, which resulted in 63 convictions and seizures worth USD 23 million. By country, Korean firms are concerned most about counterfeit auto parts, Europeans about fashionable consumer goods, and both American and European firms suffer from counterfeit pharmaceuticals. Many counterfeits appear to be imported from China or Southeast Asia. Adequate protection of trademarks also continues to be a problem of concern in Korea.

INTERNATIONAL COOPERATION AND TRAINING

¶32. (U) Following up on an April 2005 meeting between Korean government officials and a Strategy Targeting Organized Piracy (STOP!) delegation, Korean customs, patent and other officials have continued to discuss best practices and enhanced efforts to fight the trade in counterfeited goods. Since then, USG and Korean officials have continued that

dialogue in the customs, patent and enforcement areas. Korean customs practices follow TRIPS requirements in cases of suspect goods and the Korean Customs Service (KCS) conducts inspections and raids using specially-trained IPR task force teams.

¶33. (U) The generally high level of technical expertise in Korea has allowed USG training to focus on trademark adjudication, and judicial and administrative processes -- especially related to copyrights and patents. USG-funded training took place on several occasions in 2005, both in Seoul and in Washington, including a special State Department-funded IPR Enforcement Workshop in Seoul which was heavily attended by IPR-related judges and prosecutors.

KOREA's "IPR MASTER PLAN"

¶34. (U) The Korean government has reaffirmed its commitment to the "IPR Master Plan," originally issued in early 2005, and has assured us that the Plan will continue to evolve to address new concerns as they arise. (Ref I) The Master Plan, which is maintained and monitored by the Prime Minister's Office, may serve as a useful way to ensure USG concerns on IPR issues are recognized and remain on the Korean government's agenda as priorities.

¶35. (U) In addition to the items already on the Master Plan -- see last year's submission for a full listing -- we have asked the Korean government to also include and consider many of our other concerns, such as the following:

- Renunciation of Program Deliberation and Mediation Committee (PDMC) statement on software licensing;
- Providing all rights under the Copyright Act on a national treatment basis;
- Codifying doctrines of secondary liability for copyright infringement;
- Providing for ex parte remedies;
- Strengthening of technological protection measure provisions;
- Narrowing of library exceptions;
- Avoiding over-broad exemptions for distance learning;
- Extension of copyright terms;
- Maintaining an efficient and fair system of ratings for foreign works and sound recordings;
- Effective enforcement actions, including enforcement against textbook piracy, DVD piracy, and end-user software piracy;
- Application of sentencing guidelines to ensure deterrent sentences;
- Harmonization of the Copyright Act and Computer Program Protection Act;
- Continued cooperation on the STOP! Initiative;
- Continued cooperation on the APEC Anti-counterfeiting and Piracy Initiative.

CONCLUSION AND COMMENT

¶36. (SBU) Korea's planned future growth is centered on its acknowledged strengths in IT, and the country's stated desire to serve as a regional leader in investment and exports. This, coupled with an increasing need to protect Korean IPR, provides us reason to believe Korea will continue to be a cooperative partner in protecting American IPR and rightholders. The overall IPR environment in Korea is improving and there are signs that it will get better. The year 2005 was particularly encouraging on the enforcement front. While this is good news, there are still a number of areas in both the legislative and enforcement arenas where protections should be increased. Therefore, we recommend Korea remain on the Special 301 Watch List for ¶2006.

¶37. (SBU) As a final point, the Embassy notes that in its 2006 Special 301 submission, the International Intellectual

Property Association (IIPA) suggests an out-of-cycle review for Korea, particularly to assess progress on book and music piracy during 2006. While we agree that it is imperative that we signal to Korea how important it is for the National Assembly to pass the pending Copyright Act amendments as soon as possible, the Embassy believes that an out-of-cycle review is unnecessary for both tactical and practical reasons. Tactically, this year's Free Trade Agreement talks already provide strong leverage to pursue additional changes to Korean IPR law in 2006. In practical terms, any out-of-cycle review could merely end up duplicating the effort to negotiate the IPR Chapter of the FTA, since the out-of-cycle review and FTA negotiations could end up taking place at the same time.

VERSHBOW